"A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not."

It would seem clear from what I have said that no orders could rightly be made on the first four prayers of the summons in chambers taken out by the respondent. In the circumstances the orders made by the learned judge on the other prayers in the summons in chambers, except the one relating to costs, would serve no purpose except to hold up indefinitely the winding-up of the company which, after the payment out of the capital profits to the shareholders, admittedly has very little money left for distribution.

I would therefore allow the appeal, setting aside the orders made by the learned judge, and dismiss the cross-appeal. Costs of all parties as between solicitor and client both here and in the court below to be paid out from the funds in the hands of the liquidator.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal allowed.

Solicitors: *Skrine & Co.; Atma Singh Gill & Gill.*

HOW LOON SIM v. LIPSON REALTY (MALAYA) SDN. BHD.

[F.C. (Gill C.J. (Malaya) Ong Hock Sim and Raja Azlan Shah F.JJ.) April 19, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 27 of 1975]

Contract — Building contract — Additional earth cutting works — Lump sum contract — Contract completed — Full sum payable — Payment of architect's fee for abandoned work — Liability of land owner — Delay in completion — Contracts Act, 1950, ss. 70, 71 and 74.

This was an appeal from the decision of the learned trial judge in a civil suit in which the appellant, a building contractor, claimed the sum of $43,703.19 from the respondents, a housing development company for earth cutting, road levelling and drainage works. The learned trial judge awarded only a sum of $29,303.19 (after making a deduction for work not completed before the specified date) and allowed a counterclaim of $12,500 in respect of architectural fees. He dismissed a counterclaim of $81,152.33 in respect of bank interest incurred by the respondents.

Held: (1) in this case as the defence was a denial of liability and no objection was made to the quality or quantity of the work done and as it was admitted that the appellant had carried out the earth cutting, road levelling and drainage works and had completed them, the full sum as claimed without deduction, should have been awarded;

(2) the normal rule is that architectural fees are chargeable to the owner and there was no evidence in this case which would impose obligation on the appellant to pay the architect's fees for the abandoned work;

(3) the payment made could not be recovered from the appellant under either section 70 or section 71 of the Contracts Act;

(4) the learned trial judge was correct in holding that the respondent could not succeed on the counterclaim as the delay in completion was initially caused by the failure of the respondent's architect to secure approval of the plans relating thereto.

Cases referred to:-

(1) *Haji Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45.

(2) *Blay* v. *Pollard and Morris* [1930] 1 K.B. 628, 634.

(3) *Hoenig* v. *Isaacs* [1952] 2 All E.R. 176, 180-181.

(4) *Abraham Ho Ah Loke* v. *William Manson-Hing* [1949] M.L.J. 37.

(5) *Yung Book Fong* v. *Nallakaruppan Chettiar & Ors.* [1972] 1 M.L.J. 13.

(6) *Owen* v. *Tate & Anor.* [1975] 3 W.L.R. 369, 373, 377.

(7) *Holme & Anor.* v. *Guppy & Anor.* 150 E.R. 1195.

(8) *In re Garrud, ex parte Newitt* (1881) 16 Ch.D. 522, 529.

FEDERAL COURT.

Chin Yew Meng for the appellant.

R.R. Sethu for the respondents.

Ong Hock Sim F.J.: This is an appeal by the appellant, a building contractor, against the respondents, a housing development company, from that part of the judgment of the learned judge in Civil Suit No. 1502 of 1970 awarding a sum of $29,303.19 as against the sum claimed of $43,703.19 with interest and costs and awarding a sum of $12,500 in respect of architectural fees on the respondents' counterclaim in the same suit. There is also a cross-appeal against the award of $29,303.19 with interest and costs and dismissal of the respondents' amended counterclaim for the sum of $81,152.33 in respect of bank interest incurred by the respondents with the Bank of Canton from the 29th day of September 1967 to the 29th day of December 1969. There is no appeal in respect of Civil Suit No. 1286/70 which was consolidated and heard together with Civil Suit No. 1502/70. The trial was unnecessarily protracted and complicated by differences and disputes over the accounts and construction of the houses and delays over plans and completion, but as recorded by the learned trial judge:—

"At the conclusion of the hearing counsel for the plaintiff and counsel for the defendants submitted a statement of agreed issues in dispute —

Plaintiff's claim: 'Delivery of 8 qualified titles i.e. Q.T.(M) 452 to 459 (both inclusive) for Lots Nos. 283 to 290 (both inclusive) in Section 99, Town and District of Kuala Lumpur and the relevant transfers executed by the defendants' company to the plaintiff as contained in paragraphs 8(a) and (b) page 3 of the Bundle of Pleadings.

(2) $48,000 in respect of earth-cutting and road levelling works and drainage for 24 lots at $2,000 per lot as contained in page 5 of Supplementary Pleadings Appendix 'X' under entry dated July 14, 1965.

Defendant's counterclaim: Kok Kwin Lim (Repair on your behalf) $1,445 as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $1,445.

(2) Retaining Wall for Sub-Lot (1) $2,500 as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $2,500.

(3) Approach road 9 houses at $450 each $4,050 as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $2,250.

(4) Architectural Fee for abandoned job $12,500 as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $12,500.

(5) Watchman's wages from 1968 to 1969 at $100 per month — $2,400 — as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $2,400.

(6) Fencing and gates for 4 houses at $420 each as contained in page 15 of Supplementary Pleadings Appendix 'Y' dated April 15, 1970 — $840.

(7) Interest for Bank of Canton from 27-9-67 to 29.12.69 $81,152.33 as contained in page 16 of Supplementary Pleadings Appendix 'Y' under entry dated April 1970 — $81,152.33.'

I have mentioned that proceedings were unnecessarily protracted. The learned judge found "clear evidence" that the plaintiff paid in full the consideration in respect of land comprised in the 8 qualified titles upon "an admission of Yap Cheng Hock (DW2) a director" and "the defendants have failed to raise a valid defence." The learned judge further found, other than in regard to the counterclaim, "the only remaining question ... for decision is the plaintiff's claim for a sum of $43,703.19 ... arising out of the various transactions with the defendants ... being the only item on the plaintiff's statements of account not admitted ... in respect of earthcutting, road levelling and drainage works."

In regard thereto, the learned judge was of the view that while the respondents did not specifically deny paragraph 7(b) of the amended statement of claim, namely, the appellant's agreement to carry out the development plan on behalf of the company at the respondents' own cost, paragraph 4 of the amended defence clearly admitted execution of the contract of September 3, 1965 and had reference to the earth-cutting works. He was also of opinion that the appellant was entitled to compensation for the earthwork done before July 1, 1965 but was to bear the cost after July 1, 1965, which appellant conceded had not been completed to the extent of 30% before July 1, 1965. He accordingly reduced this claim by $14,400. He found no substance in the defendants' denial of this claim and I respectfuly agree therewith.

It is the appellant's contention, however, that this disallowance should not have been made on the ground that the defence was a denial of liability and did not object to the quality or quantity of work done and the learned judge erred in going outside the issues raised. Mr. Chin cited *Haji Mohamed Dom* v. *Sakiman*[1] where Mathew C.J. said:

"I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record."

Reference was made to *Blay* v. *Pollard & Morris*[2] where Scrutton L.J. stated:

"... if it is desired to raise other issues they must be placed on the record by amendment."

The respondents made no application to amend at any time though item 14 in the statement of account attached to the amended statement of claim showed a sum of $48,000 "to earth cutting and road levelling works and drainage for 24 lots @ $2,000 per lot." The appellant relied on his letter of June 17, 1965 where item 2 in paragraph 3 clearly stated that the deposit of $48,000 made in connection with the agreement of October 12, 1964 would be "deducted together with all the advances made by me to the squatters, *levelling of site* (earth work), felling etc." (The italics are mine), and the agreement of November 3, 1966 item 3 "An additional sum of $2,000 per house shall be payable for the access road." Yap Cheng Hock (DW2) a director of the respondents testified that "the company accepted the earth cutting done by the plaintiff." Nowhere in his evidence did he repudiate or reject item 14 of the statement of account nor did he say anything in reply to appellant's letter of November 17, 1967 with statement of account for "work on earth cutting, road and drainage etc. on 24 units at $2,000 each ... $48,000". With respect, therefore, the learned judge should have discounted the evidence of the architect (DW3) that the cutting and filling was badly done or that such expenses after July 1, 1965 was to be borne by the appellant. The appellant did not agree though he accepted that "it is true according to the letter that work done after July 1965 had to be borne by me. About 30% of the earth cutting, etc. were done after July 1" as it must be noted that the last paragraph of that letter said "a new agreement has to be drawn up regarding such development." Mr. Chin submitted further that the full sum was payable as it was in respect of a lump sum contract and cited *Hoenig* v. *Isaacs*[3] and referred to the judgment of Denning L.J. (as he then was):

"The question of law that was debated before us was whether the plaintiff was entitled in this action to sue for the £350 balance of the contract price... The defendant said that he was only entitled to sue on a quantum meruit....

In determining this issue the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or, alternatively, set them up in diminution of the price....

It is always open to a party to waive a condition which is inserted for his benefit. What amounts to a waiver depends on the circumstances. If this was an entire contract, then, when the plaintiff tendered the work to the defendant as being a fulfilment of the contract, the defendant could have refused to accept it until the defects were made good, in which case he would not have been liable for the balance of the price until they were made good. But he did not refuse to accept the work... That was a clear waiver of the condition precedent."

In the instant case, the appellant testified he continued earth cutting until October 1965 and this was confirmed by the architect in answer to the court that the proper cutting and filling was done after July 1, 1965. DW2 agreed the appellant had cut the land for building the houses and that the cutting was completed. In my view, therefore, the full sum as claimed without deduction should have been awarded and I would, therefore, allow the appeal and so vary the order of the court below. It necessarily follows that the cross-appeal in respect of this part of the judgment is dismissed with costs.

In so far as the sum of $12,500 being architectural fee is concerned, the appellant says there is no legal basis in support thereof as he had not authorised the respondent, expressly or impliedly, to make the payment on his behalf. In allowing the counterclaim, the learned judge apparently relied on the fact by payment of the bill (D10) by Mr. Yap (DW2) and the claim of Mr. Wong (DW3) that he was entitled to charge

two-thirds fee for abandoned jobs in accordance with architectural practice. "As Mr. Wong's testimony was not challenged" he concluded that was "sufficient evidence to establish that the plaintiff was liable to pay for this sum." With respect, the learned judge failed to consider upon whom the legal liability was imposed. There is no provision in the contract of September 3, 1965 that architectural fees normally chargeable to the "Owner" was included in the "Contract Sum." See *Emden and Watson* — Building Contracts and Practice, Sixth Edition, page 325 which reads:—

"The ordinary employment of an architect ... is by the building owner ... and he has to look to the latter for his remuneration."

The plans were for the 11 abandoned houses to be built on the land belonging to the respondents and for them. The bill (D10) was addressed to the respondents and not to appellant, who denied all knowledge of the bill. Ex facie, there is no evidence which would impose obligation on the appellant in respect of this items. We were referred to the case of *Abrahim Ho Ah Loke* v. *William Manson-Hing*[4] where the Court of Appeal held that in the absence of an express contract, an architect is not entitled to claim for work done by him if the plans prepared are not approved or made use of by the person who asked him to prepare the plans. Mr. Yap (DW2) clearly testified that "the bill for architectural fee was in respect of the abandoned job" and Mr. Wong (DW3) said "This relates to the 11 abandoned houses ... which the plaintiff instructed me to apply to the planning department for approval and which was subsequently disapproved." The payment made cannot be recovered from the appellant under either section 70 of the Contracts Act (No. 136 — Rev. 1974) or section 71. [See *Yong Book Fong* v. *Nallakaruppan Chettiar & Ors.*[5]]. In *Owen* v. *Tate & Anor*,[6] Scarman L.J. quoted *Goff and Jones*, the Law of Restitution (1966), p. 207:

"To succeed in his claim, however, the plaintiff must satisfy certain conditions. He must show (1) that he has been compelled by law to make the payment; (2) that he did not officiously expose himself to the liability to make the payment; (3) that his payment discharged a liability of the defendant; and (4) that both he and the defendant were subject to a common demand by a third party, for which, as between the plaintiff and the defendant, the latter was primarily responsible."

and went on to say:

"If without an antecedent request a person assumes an obligation or makes a payment for the benefit of another, the law will, as a general rule, refuse him a right of indemnity."

I would, therefore, disallow the sum of $12,500 for architectural fees and set aside that part of the order. The appeal is, therefore, to that extent allowed.

There only remains the cross-appeal relating to the dismissal of the counterclaim for interest for the Bank of Canton from September 27, 1967 to December 29, 1969 amounting to $81,152.33, as against the sum of $102,055.99 for alleged failure of the appellant to complete the construction of 9 houses within 3 months from November 6, 1966 in accordance with item 5 of the letter of November 3, 1966 to the effect:

"5. The 9 houses shall be completed within 3 months from to-day, failing which I agree to bear and pay the bank interest payable on your Overdraft Account with the Bank of Canton Ltd. in the sum of $300,000."

In reply, the appellant denied liability on the ground that the delay in completion was caused by the failure of the respondents' architect to secure approval of the plans relating thereto. The appellant says that by the amended counterclaim it was apparent that the respondents had disentitled themselves to a claim for damages in respect of bank interest. As appears in *Emden and Watson* (cit) at page 195:

"Where the liquidated damages are stipulated for at so much per day or per week, there must be a definite date from which they are to run. If no such date is fixed by the contract, or if by the operation of intervening circumstances the date fixed by the contract has ceased to be operative, and there is no provision in the contract by which another date can be substituted, all rights to recover the sum stipulated for as liquidated damages have gone."

And in *Halsbury's* Laws of England, Third Edition, Volume 3, at page 489, it is stated: —

"In many cases the time fixed by the contract ceases to be applicable on account of some act or default of the employer or his architect. A provision, therefore, is generally inserted, in order to avoid such acts or defaults destroying the right to liquidated damages, by which the architect is empowered to grant an extension of time in certain specified events, and the contractor is bound, in case such an extension has been properly granted, to complete within the extended time. This has the effect of substituting for the time fixed by the contract a new time from which the liquidated damages are to run."

No such clause providing for extension exists in the contract and we were referred to *Holme & Anor.* v. *Guppy & Anor.*[7] where it was held that if the defendants had been guilty of initial delay resulting in delay on the part of the plaintiffs in executing the works within the original contractual period the subsequent delay caused by the plaintiffs would not entitle the defendants to the right to recover damages. There is no evidence of any new arrangement for completion after the expiration of the 3 months from November 3, 1966 or of any fresh agreement relating to the bank interest. No notice of any claim to compensation for loss for non-completion at the agreed time or any extended time was given. Certificates of Fitness were only applied on January 25, 1969 and on three subsequent occasions, namely, June 5, 1969, December 29, 1969 and August 3, 1971. The respondents had conceded that "it was not possible for the plaintiff to complete the 9 houses within 3 months from November 3, 1966" but sought to rely on section 74 of the Contracts Act as entitling them to damages actually suffered, though not for unliquidated damages, if the contractor failed to complete within a reasonable time, read with sections 40 and 47 (citing *In re Garrud. Ex parte Newitt.*).[8] The learned judge was fully justified in rejecting this claim and saying that "it is clearly established that the delay was not caused by any acts or default on the part of the plaintiff. There was in the present case a delay of about 11 months and such delay was due entirely to the faults or acts of the defendants.... In the present case there is nowhere asserted by the defendants that consequent upon the failure on the part of the plaintiff to complete the works within 3 months from November 3, 1966, that they had given notice to the plaintiff that they would claim interest or compensation for the less occasioned by the non-completion. Furthermore, there was no notice, indeed there was no agreement to that effect, that they would claim interest on the overdraft if the plaintiff could not complete the

building of the houses within three months after the plans for the septic tanks had been supplied to the plaintiff. On the evidence adduced by both the plaintiff and the defendants, it is my judgment that there is no merit in the defendants' counterclaim."

I would, therefore, dismiss the cross-appeal with costs in respect thereof.

In the result I would allow the appeal and dismiss the cross-appeal with costs.

Gill C.J. (Malaya) and **Raja Azlan Shah F.J.** concurred.

Appeal allowed. Cross appeal dismissed.

Solicitors: *Allen & Gledhill; Chin, Sethu & Co.*

HAJI HAMID BIN ARIFFIN & ANOR. v. AHMAD BIN MAHMUD

[F.C. (Suffian L.P., Ali and Wan Suleiman F.JJ.) April 24, 1976]

[Alor Star — Federal Court Civil Appeal No. 57 of 1975]

Land Law — Malay Reservation — Land sold to Siamese — Sale void — Kedah Malay Reservation Enactment (No. 63), s. 6.

In this case the registered proprietor of Malay Reservation land Mahmud bin Samad, a Malay, had sold it to a Siamese lady. On execution of the agreement, possession of the land and of the title deed to the land was given to the purchaser. Subsequently the Siamese lady sold the land to the appellants, who were Malays. The land was still registered in the name of Mahmud, who had since died. In this case the appellants who were administrators of the estate of the Siamese lady sued the administrator of Mahmud's estate for specific performance. It was agreed that the sole question for decision was whether the sale by Mahmud to the Siamese lady was enforceable under the provisions of the Kedah Malay Reservation Enactment (No. 63). The learned trial judge held that the sale was void. The appellants appealed to the Federal Court.

Held, dismissing the appeal, by virtue of section 6(2) of the Kedah Malay Reservations Enactment, the purported sale was void *ab initio* and it could not be enforced by the purchaser nor could the purported purchaser pass a good title to another, even if he be a Malay.

Cases referred to:-

(1) *Goh Soon Leong* v. *Commissioner of Lands & Ors.* [1951] M.L.J. 201.

(2) *Foo Say Lee* v. *Ooi Heng Wai* [1969] 1 M.L.J. 47.

(3) *Mistry Amar Singh* v. *Serwano Wofunira Kulubya* [1963] 3 W.L.R. 513; [1964] A.C. 142.

FEDERAL COURT.

Mayandi for the appellant.

G. N. Christie for the respondent.

Suffian L.P. (read by Wan Suleiman F.J.): This is a dispute concerning a piece of Malay Reservation Land comprised in Surat Putus No. 5275 in the District of Kota Setar, Kedah.

The agreed facts in the case are short and simple. In 1944 its registered proprietor, one Mahmud bin Samad (a Malay), sold the land to a Siamese lady, Ah Yam d/o Ah Nam @ Nyonya Yam d/o Indin Nom.

On execution of the agreement, possession of the land and of the title deed to the land was given to the purchaser. The purchase price was paid in three instalments.

Subsequently the Siamese lady (now deceased) sold the land to the present plaintiffs who are Malays.

The land is still registered in Mahmud's name. Mahmud has since died.

The present plaintiffs as administrators of the Siamese lady's estate sued the administrator of Mahmud's estate for specific performance.

At the hearing it was decided by counsel that the sole question to be decided was whether the sale in 1944 by Mahmud to the Siamese lady was enforceable under the provisions of the Kedah Malay Reservation Enactment (No. 63), it being understood that if it was not so, then there could not be specific performance in favour of the plaintiffs.

The learned trial judge held that it was void because of section 6 of the Enactment.

That section reads as follows:

"6. (1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer ... or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer ... or otherwise, in any person who is not either a Malay or a Siamese.

(2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void."

His Lordship held that therefore the second sale by the Siamese lady to the plaintiffs is also void although the plaintiffs are also Malays, and dismissed the plaintiffs' claim. The plaintiffs have appealed to us.

It was first argued by Mr. Mayandi on their behalf that the learned judge's decision is not correct on the following ground: the first sale by Mahmud to the Siamese lady was only voidable at the instance of the vendor, the second sale cannot be void as the land has come back into the hands of a Malay. Every enactment must be looked at in the spirit in which it was enacted. In the case of the Malay Reservation Enactment and in particular its section 6, the aim was to safeguard Malay ownership of Malay Reservation lands. As the plaintiffs are Malays, the court should help them and order the land to be vested in them.

Mr. Mayandi relied on a decision of the Court of Appeal in *Goh Soon Leong* v. *The Commissioner of Lands & Ors.*[1]

Goh Soon Leong's case was not cited before his Lordship. It was said that had it been cited, the learned trial judge would probably have held that the first sale by Mahmud to the Siamese lay was not absolutely prohibited or necessarily void *ab initio* and therefore the second sale by the Siamese lady to the plaintiffs who are Malays was valid.

Secondly, it was argued by Mr. Mayandi that the vendor Mahmud, having sold the land and delivered